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NO. 92-206

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a rule of law which creates an irrebuttable presumption that is not necessarily or universally true, and which operates to deprive an insured of insurance coverage, deprives the insured of property without due process of law in violation of the fifth and fourteenth amendments to the Constitution of the United States.

2. Whether a rule of law which creates an irrebuttable presumption that all criminal sexual offenders intend or expect to injure their victims denies equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

3. Whether a rule of law which effectively amends and expands an insurance policy exclusion in a manner which operates to deprive insureds of insurance coverage which would otherwise be available impairs the

obligations of contracts between insurers and insureds in violation of the Constitution of the United States, article 1, § 10, cl. 1.

LIST OF PARTIES

American Family Mutual Insurance Co.
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, SD 57101

Bradley Alan Purdy
519 W. 940 N. #15
Provo, UT 84604
--or--
3508 Cypress Court
Rapid City, SD 57701

David Lerback
Jani Lerback
Christian Lerback
Andrew Lerback
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Rapid City, SD 57709-8045

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	ix
REFERENCE TO OFFICIAL REPORT OF OPINION	xiv
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
A. MATERIAL FACTS	6
B. PROCEDURAL HISTORY	9
C. APPEAL TO THE SUPREME COURT OF SOUTH DAKOTA	19
1. Legal inference ignores language of exclusion	21
2. Legal inference ignores individuality of the human mind	22
3. Adoption of legal inference would ignore scientific evidence	25
4. Adoption of legal inference would violate the Constitution of the United States	26

	Page
a. Due Process	27
i. Insureds hold a property interest in insurance coverage	27
ii. Legal inference creates irrebuttable presumption	28
iii. The irrebuttable presumption is not necessarily nor universally true	29
iv. The irrebuttable presumption unconstitutionally deprives citizens of property without due process of law	29
v. Reasonable alternative means exist to determine intention or expectation	30
b. Equal Protection	32
i. Perpetrators of non-sexual criminal contact are afforded an opportunity to demonstrate the absence of intent to injure or expectation of injury	33
ii. The legal inference applies a different legal standard which denies equal protection of the laws	34

Page

iii. No rational basis exists for distinguishing between criminal sexual contact and other forms of criminal contact 35

c. Impairment of obligations of contract 38

i. The Supreme Court of South Dakota is a state actor 38

ii. The Purdy decision impairs the obligations of the insurance contract 39

ARGUMENTS SUPPORTING ISSUANCE OF A WRIT OF CERTIORARI

I. A State Court has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of the Supreme Court of the United States 40

A. The Supreme Court of South Dakota established a rule of law which created an irrebuttable presumption that is not necessarily or universally true, and which serves to deprive insureds of insurance coverage without due process of law 40

1. Purdy established an irrebuttable presumption which is not necessarily or universally true 40

Page

2. The irrebuttable presumption deprives the insured of property without due process of law 41

3. Purdy conflicts with applicable decisions of the Supreme Court of the United States 41

a. Purdy establishes an irrebuttable presumption 43

b. The irrebuttable presumption operates to deprive property 43

c. No pre-deprivation procedural protection is provided 44

d. Reasonable alternative means exist for determining insureds' intentions or expectations 45

B. Review is necessary to resolve the conflict between Purdy and decisions of the Supreme Court of the United States 46

II. A State Court of Last Resort has Decided an Important Question of Federal Law which has not been, but should be, Settled by the Supreme Court of the United States 47

Page

A. The Purdy opinion denies equal protection of the law to perpetrators of criminal sexual contact by depriving them of insurance coverage without providing the same procedural safeguards afforded to perpetrators of other forms of criminal contact 48

1. This issue has been decided by a large number of jurisdictions 48

2. The majority infer an intent or expectation as a matter of law 50

3. The legal inference denies equal protection of the law 51

4. No rational basis exists for a distinction based on the type of crime 52

B. The Purdy decision established a rule of law which impairs the obligations of contract in violation of the Constitution of the United States 53

1. An insurance agreement is a contract 55

2. The Purdy decision established new law 56

3. Purdy impaired the obligations of the insurance contract 57

Page:

4. Whether a decision of a state court of last resort makes law subject to the Contracts Clause is an important federal question 61

CONCLUSION 62

TABLE OF AUTHORITIES

Cases:	Pages:
SUPREME COURT OF THE UNITED STATES:	
Bishop v. Wood, 426 U.S. 341, 344, n. 6, 96 S. Ct. 2074, 2077 n. 6 (1976)	27, 44
Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972)	27, 44
Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974)	29, 30, 43, 46
Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231 (1934).	54
Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972)	29, 43, 46
Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819)	54
Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230 (1973)	29, 43, 46
UNITED STATES COURTS OF APPEALS:	
Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979)	27, 44
Gray Panthers v. Schweiker, 652 F.2d 146, 148, n. 2 (D.C. Cir. 1981)	27, 44
State Farm Fire & Casualty Co. v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989)	28, 43
State Farm Fire & Casualty Co. v. Estate of Jenner, 856 F.2d 1359 (9th Cir. 1988), superseded, 874 F.2d 604 (9th Cir. 1989)	50

	Pages:
State Farm Fire & Cas. Co. v. Smith, 907 F.2d 900, (9th Cir. 1990)	28, 45, 49
UNITED STATES DISTRICT COURTS:	
Allstate Ins. Co. v. Foster, 693 F. Supp. 886 (D. Nev. 1988)	49
Allstate Ins. Co. v. Jack S., 709 F. Supp. 963 (D. Nev. 1989)	49
Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815 (D. Alaska 1987)	49
Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056 (W.D. Okla. 1988)	49
Foremost Ins. Co. v. Weetman, 726 F. Supp. 618 (W.D. Pa. 1989)	49
State Auto Mutual Ins. Co. v. McIntyre, 652 F. Supp. 1177, 1195 (N.D. Ala. 1987)	50
Whitt v. Deleu, 707 F. Supp. 1011 (W.D. Wis. 1989)	62
STATE COURTS OF LAST RESORT:	
Ahl v. Arnio, 388 N.W.2d 532 (S.D. 1986)	53
Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990)	49
Hipp v. Prudential Casualty and Surety Co., 60 S.D. 300, 244 N.W. 346 (1946)	59
Altena v. United Fire & Casualty Company, 422 N.W.2d 485 (Iowa 1988)	49

	Pages:
American Family Mutual Insurance Co. v. Purdy, 483 N.W.2d 197 (S.D. 1992)	PASSIM
Atlantic Employers Ins. Co. v. Tots & Toddlers, 239 N.J. Super. 276, 571 A.2d 300 (1990), cert. denied, 122 N.J. 147, 584 A.2d 218 (1990)	50
Carlson v. Hudson, 277 N.W.2d 715 (S.D. 1979)	27, 44
CNA Ins. Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984)	49
Estate of Lehmann by Lehmann v. Metzger, 355 N.W.2d 425 (Minn. 1984)	49
Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982)	50
Horace Mann Ins. Co. v. Ind. Sch. Dist. No. 656, 355 N.W.2d 413 (Minn. 1984)	49
Horace Mann Ins. Co. v. Leeber, 180 W. Va. 375, 376 S.E.2d 581 (1988)	50
J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689 (1991)	49
Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989)	49
MacKinnon v. Hanover Insuranc Co., 471 A.2d 1166 (N.H. 1984)	50
N.N. v. Moraine Mut. Ins. Co., 153 Wis. 2d 84, 450 N.W.2d 445 (1990)	50
New Hampshire Ins. Group v. Strecker, 244 Mont. 478, 798 P.2d 130 (Mont. 1990)	50

Pages:

Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100 (Me. 1990) 49

Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash. Ct. App. 1986), aff'd, 729 P.2d 627 (Wash. 1986) 22, 50, 51

State Farm Fire & Casualty Co. v. Williams, 355 N.W.2d 421 (Minn. 1984) 49

State Farm Fire & Cas. v. van Gorder, 235 Neb. 355, 455 N.W.2d 543 (1990) 50

Tri-State Insurance Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991) 33, 34, 36, 61

Vermont Mut. Ins. Co. v. Malcolm, 128 N.H. 521, 517 A.2d 800 (1986) 50

Worcester Ins. v. Fells Acres Day School, 408 Mass. 393, 558 N.E.2d 958 (1990) 49

STATE APPELLATE COURTS:

Allstate Ins. Co. v. Jarvis, 195 Ga. App. 335, 393 S.E.2d 489 (1990) 49

Auto-Owners Ins. Co. v. Gardipey, 173 Mich. App. 711, 434 N.W.2d 220 (1988) 49

Harpy v. Nationwide Mutual Fire Ins., 76 Md. App. 474, 545 A.2d 718 (1988) 49

Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Ct. App. Minn. 1986) 50

K.A.G. by Carson v. Stanford, 148 Wis. 2d 158, 434 N.W.2d 790 (App. 1988) 50

Pages:

Linebaugh v. Berdish, 376 N.W.2d 400 (Mich. Ct. App. 1985) 49

Mutual Service Casualty Insurance Co. v. Puhl, 354 N.W.2d 900 (Minn. App. Ct. 1984) 50

Roe v. State Farm Fire & Cas. Co., 188 Ga. App. 368, 373 S.E.2d 23 (1988) 49

St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540 (Ariz. Ct. App. 1986) 62, 63

Scudder v. Hanover Ins. Co., 201 Ill. App. 3d 921, 147 Ill. Dec. 386, 559 N.E.2d 559 (1990) 49

State Mut. Ins. Co. v. Russell, 185 Mich. App. 521, 462 N.W.2d 785 (1990) 49

Twin City Fire Ins. Co. v. Doe, 163 Ariz. 388, 788 P.2d 121 (App. 1989) 49

Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382 (Mich. Ct. App. 1982) 62, 63

Western Nat. Assur. Co. v. Hecker, 43 Wash. App. 816, 719 P.2d 954 (1986) 50

Constitutional Provisions:

U.S. Const. amend. V 1, 2, 30, 32

U.S. Const. amend. XIV 1, 2, 30, 32, 53

U.S. Const. art. 1, § 10, cl. 1 2, 38, 54, 60

Pages:

Statutes:

18 U.S.C. § 17 — 1, 25

28 U.S.C. § 1257 — 1

SDCL § 22-22-7 (Michie 1992) — 9

Secondary Authorities:

Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R.4th 957 (1984) — 33

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED IN THIS CASE

American Family Mutual Insurance Co. v. Purdy, 483 N.W.2d 197 (S.D. 1992).

JURISDICTIONAL STATEMENT

Petitioner respectfully requests the court to issue a writ of certiorari to the Supreme Court of South Dakota to review its decision in the case of American Family Mutual Insurance Co. v. Purdy, 483 N.W.2d 197 issued March 25, 1992. By order dated April 29, 1992, the Supreme Court of South Dakota denied rehearing of the cause on appeal. This court has jurisdiction to review the Supreme Court of South Dakota's decision by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis added).

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added).

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. art. I, § 10 (emphasis added).

STATEMENT OF THE CASE

This case involves the sexual molestation (fondling of genitals) of two

young boys by a very close family friend. The boys, Christian and Andrew, and their parents, David and Jani, brought a civil lawsuit seeking compensation for their damages against the perpetrator, Bradley Alan Purdy ("Purdy"). Purdy tendered the defense of the matter to his parents' homeowner's insurance carrier, American Family Mutual Insurance Co. ("American Family").

American Family undertook the defense in the principal action under a reservation of rights. American Family simultaneously commenced a declaratory judgment action seeking a judgment that American Family had no obligation to defend Purdy against any of the claims set forth in Lerbacks' complaint filed in the principal action, and that American Family had no duty to indemnify Purdy for any judgment which might be rendered against him in the principal action.

A trial of the principal action resulted in a verdict in favor of the Lerbacks in the amount of Ninety-two Thousand Four Hundred Dollars ($92,400). A trial of the declaratory action resulted in a verdict in favor of the Lerbacks and Purdy concluding that American Family was obligated to defend and indemnify Purdy in the principal action.

American Family appealed the declaratory judgment to the Supreme Court of South Dakota. The Supreme Court of South Dakota reversed the trial court and held that there was no coverage under the homeowner's insurance policy and that American Family had no duty to defend or indemnify Purdy in the principal action. American Family Mutual Insurance Company v. Purdy, 483 N.W.2d 197 (S.D. 1992). By so doing, the Supreme Court of South Dakota created a judicial rule of law which holds that in all cases of criminal sexual

contact, perpetrators intend or expect to injure their victims. Id. at 201.

The Purdy decision was rendered March 25, 1992. A Petition for Rehearing was denied April 29, 1992. Copies of the Purdy Decision and the Order Denying Rehearing are located in the Appendix at pp. 90-109, 136-37.

Review is necessary because the Purdy decision creates a rule of law which violates the Constitution of the United States. This case raises important federal questions because the same constitutional violations made by Purdy are being committed by approximately twenty-five jurisdictions throughout the United States. Constitutional violation of such magnitude mandates Supreme Court analysis to extinguish its proliferation and to protect citizens' constitutional rights.

David Lerback, Jani Lerback, and David Lerback as Guardian Ad Litem of Christian

Lerback and Andrew Lerback, minors, respectfully petition the court to issue a writ of certiorari for the following reasons: first, the Supreme Court of South Dakota has decided a federal question in a way that conflicts with decisions of the Supreme Court of the United States; and second, the Supreme Court of South Dakota has decided important questions of federal law which have not been, but should be, decided by the Supreme Court of the United States. Rules of the Supreme Court of the United States, Rule 10.1.(c).

A. MATERIAL FACTS

David Lerback and Jani Lerback, husband and wife, have two sons: Christian and Andrew. Christian Lerback was born September 21, 1973 and was between the ages of eight and twelve during the time he was sexually molested by a close family friend, Bradley Alan Purdy ("Purdy").

Andrew Lerback was born December 27, 1978. Andrew was between the ages of three and seven during the time he was sexually molested by Purdy.

Purdy was born February 8, 1964. Purdy himself had been sexually molested as a young man. Purdy was between the ages of eighteen and twenty-two during the time he sexually molested the Lerback boys. Purdy sexually molested Christian and Andrew at various time throughout the summers of 1982 through 1986.[1]

Lerbacks became acquainted with Purdy in 1982. Purdy had assisted the Lerbacks moving their residence from a local air force base into Rapid City. They quickly became close friends. In fact, the Lerbacks considered Purdy their adopted son/brother. Purdy would frequently visit the Lerbacks' home. He would often spend

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[1]No molestation occurred during the summer of 1984 because Purdy was in Germany on a church mission.

time playing with the Lerback children (Christian, Andrew, and their sister, Jennifer).

From time to time, David would be at work and Jani would have to leave the house to run various errands. Under such circumstances it would not be uncommon for Jani to leave the children in Purdy's care for a short period of time.

Unbeknownst to David or Jani, Purdy would take advantage of such opportunities to sexually molest Christian and Andrew. During the period from 1982 through 1986, Purdy sexually molested Andrew Lerback on at least fifteen occasions, and Christian at least three times.

The sexual molestations consisted of Purdy fondling the boys' genitals. There was no evidence that Purdy ever engaged in oral or anal sex with the boys.

The sexual molestations abruptly concluded one day when Jani told Andrew that she was going to be leaving him in Purdy's care for a few minutes while she

took her daughter, Jennifer, to baseball practice. Andrew objected and began acting strangely -- he began talking baby talk. When Jani inquired why he did not want to stay with Purdy, Andrew answered: "him plays with my private parts, Mom."

Purdy was criminally charged with felony sexual contact with a child under the age of sixteen in violation of SDCL 22-22-7. At the time of his arrest, Purdy was evaluated at a local mental health facility and was diagnosed as a homosexual pedophile. Purdy plead guilty to the charge and was ultimately given a suspended imposition of sentence after serving a short jail term and paying a small fine.

B. PROCEDURAL HISTORY

David and Jani Lerback, on their own behalf, and David Lerback as guardian ad litem for Christian and Andrew, commenced a civil lawsuit against Purdy seeking compensation for damages they had suffered, and would suffer, as a result of Purdy sexually molesting the boys.

Since Purdy was a resident of his parents' household during the summers when the sexual molestations had occurred, Purdy was insured under his parents' homeowner's insurance policy. Purdy tendered the defense of the civil lawsuit ("principal action") to the homeowner's insurance carrier, American Family.

American Family provided a defense for Purdy in the principal action under a reservation of rights. Simultaneously, American Family commenced a declaratory judgment action, seeking a declaration that American Family had no obligation to defend or indemnify Purdy from Lerbacks' claims.

American Family's action was based solely[2] upon exclusions contained in the homeowner's policies[3] which excluded

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[2] American Family does not contend that any other policy provision precludes coverage.

[3] Because the molestation occurred over a period of several years, more than one homeowner's policy was issued to Purdys by American Family; however, the intentional injury exclusion was worded identically in each policy.

coverage for any bodily injury ". . . which is expected or intended by any **insured.**" The policy defines "insured" as:

> **Insured** means **you** and **your** relatives if residents of your household.

"You" is defined as the person whose name appears on the declarations page. Purdy's parents' names are listed on the declarations pages of the policies at issue in this case.

American Family claimed that Purdy had intended or expected to injure the Lerback boys. Therefore, American Family argued, coverage was excluded the policy's intentional injury exclusion.

Purdy's deposition was taken as part of both the principal action and the declaratory judgment action. During the deposition, Purdy was specifically asked whether he had intended to cause any injury to the Lerback boys. Purdy testified that he had not intended to cause them any harm. Deposition of Bradley Purdy, September 13,

1988, p. 58, lines 3-4; p. 61, lines 18-19. (App. 1.)

Similarly, Purdy was asked whether he had expected that the Lerback boys would suffer some degree of emotional distress as a result of the sexual molestation. Purdy testified that he had not expected they would be injured. Deposition of Bradley Purdy, p. 61, line 20 through p. 62, line 5; see also p. 73, line 11 through p. 75, line 23. (App. 1-6.)

Purdy testified that the molestations were an impulsive/compulsive act. Deposition of Bradley Purdy, p. 63, lines 2-9; p. 76, line 15 through p. 77, line 15; p. 81, lines 1-18. (App. 2-8.) He said he performed the acts in an effort to understand his own sexual molestation experience and gave no thought to the effect his acts might have on the children. Id. at p. 63, lines 6-9. (App. 2.)

In October, 1988, American Family moved for summary judgment. American Family based its motion on case law which

held that in cases of sexual abuse, an intent to injure or an expectation that injury would result from the sexual abuse could be inferred as a matter of law.

In response to American Family's motion, the trial court permitted Lerbacks' counsel to obtain an independent psychological evaluation of Purdy to investigate Purdy's intentions and expectations at the time the boys were molested. As part of that evaluation, Purdy was tested on August 11, 1989, using the Minnesota Multi-phasic Personality Inventory. See Affidavit of Dr. Fred McCall-Perez dated January 2, 1990. (App.9-11.) Lerbacks retained an expert, Dr. Fred McCall-Perez, Ph.D., who interpreted the MMPI results as well as other available relevant psychological information about Purdy. Id. The test results indicated that Purdy suffered from impulse control difficulties. Under stressful circumstances, this condition could cause

Purdy to act out in a sexually inappropriate way. Id.

Dr. McCall-Perez submitted an affidavit in opposition to American Family's summary judgment motion. Id. He opined that Purdy did not intend to injure the Lerback boys at the time he sexually molested them. He explained that Purdy suffered from psychological conditions which caused Purdy to believe the sexual molestation incidents were expressions of love which would not injure the Lerback boys. Id.

Dr. McCall-Perez's affidavit in combination with Purdy's testimony, raised a genuine issue of material fact concerning Purdy's intentions or expectations at the time of the sexual molestations. Therefore, on May 1, 1990, the trial court denied American Family's summary judgment motion. See Letter Opinion from the Honorable Jeff W. Davis dated May 1, 1990. (App. 12-15.)

On December 3, 1990, American Family once again moved for summary judgment. The trial court denied the motion by Order dated December 17, 1990. (App. 16-18.)

A trial of the principal action was held January 23-24, 1991. During the trial, Dr. McCall-Perez was present in the courtroom and was able to observe Bradley Purdy. One of the things Dr. McCall-Perez observed was when Purdy requested the court for permission to take the stand and offer testimony regarding his own personal sexual molestation experiences. Purdy wanted to tell the jury that he had been sexually molested as a child and had not suffered adverse effects. Purdy wanted to use this testimony as evidence to prove that since he had not suffered adverse effects as a result of the sexual molestation, the Lerback boys had not suffered, and would not suffer, any adverse effects. Of course, the trial court refused Purdy's request to present this

type of evidence. (T.T. pp. 223-24) (App. 19-21.)

The principal action concluded with a verdict in favor of the Lerbacks awarding total damages in the amount of Ninety-two Thousand Four Hundred Dollars ($92,400).

The declaratory judgment action was tried to the court on January 25, 1991, the day following the trial of the principal action. American Family's case-in-chief consisted of the introduction of the applicable insurance policies, the amended complaint from the principal action, and transcripts of the testimony given at the trial of the principal action by Christian and Andrew Lerback. American Family called David Lerback to testify regarding the number of incidents of sexual molestation. American Family then rested its case.

To defend against American Family's reliance on the intentional injury exclusion, Lerbacks called Dr. McCall-Perez to testify with respect to Purdy's intentions or expectations at the time of

the sexual molestations. (A.T. pp. 11 - 58) (App. 22-47). Dr. McCall-Perez opined that Purdy had not intended to injure the Lerback boys. (A.T. pp. 11-17) (App. 25-29). Dr. McCall-Perez based this opinion on several grounds, including the results of Purdy's MMPI which revealed that Purdy's personality was inconsistent with that of a person who would intend to harm another person. Id.

Dr. McCall-Perez also opined that Purdy did not expect to injure the boys by sexually molesting them. (A.T. pp. 17-25) (App. 29-44). Dr. McCall-Perez's opinion was supported by his observations of Purdy attempting to testify in the principal action that he himself had not been adversely effected by his own sexual molestation as a young boy. Id. Dr. McCall-Perez testified that this demonstrated Purdy's belief that the boys would not be injured, and therefore, he did not expect to injure them by sexually molesting them.

To rebut Dr. McCall-Perez's opinions, American Family called Dr. Michael McGrath, Ph.D. (A.T. pp. 59-73) (App. 47-54.) Dr. McGrath's testimony consisted solely of reasons why he believed Dr. McCall-Perez did not have a sufficient foundation to reach his opinions. Id.

On cross-examination, Dr. McGrath conceded that if the information was available which he believed would be necessary in order for Dr. McCall-Perez to reach his opinions, that information could in fact support Dr. McCall-Perez's opinions. (A.T. pp. 68-73) (App. 52-54.) Dr. McGrath testified that it was equally probable that Purdy did not intend to injure the Lerback boys, and that Purdy did not expect that they would be injured by the sexual molestation. Id.

American Family did not introduce any positive evidence whatsoever to prove that Purdy did in fact intend or expect injury. They simply attempted to prove their case by introducing circumstantial evidence

which they hoped would convince the court that it was impossible to believe otherwise.

The trial court found Dr. McCall-Perez's testimony to be more credible than that of Dr. McGrath. (Transcript of Court's Decision pp. 4-5) (App. 56-62). The trial court found that Purdy had not in fact intended or expected to injure the Lerback boys at the time he sexually molested them. (Findings of Fact No. 9 & 10) (App. 69-70.) The trial court concluded that since there was no intention or expectation of injury, the exclusion on which American Family relied did not apply. (Conclusion of Law No. 3) (App. 70-71). Therefore, the trial court entered a judgment ordering American Family to defend and indemnify Purdy in the principal action. (App. 63-65.)

C. APPEAL TO THE SUPREME COURT OF SOUTH DAKOTA

American Family appealed the declaratory judgment to the Supreme Court of South Dakota. American Family alleged

the trial court had erred in denying its two motions for summary judgment. American Family urged the Supreme Court of South Dakota to adopt the holdings of other jurisdictions which held that the perpetrator's intent to injure or expectation of injury may be inferred as a matter of law due to the very nature of the conduct involved (sexual molestation).[4]

Lerbacks cautioned the Supreme Court of South Dakota to reject American Family's entreaty. Lerbacks argued that the language of the intentional injury exclusion applied only when the insured expects or intends injury. Lerbacks directed the court's attention to the fact that the exclusion's language was drafted to focus attention on the insured's subjective intentions or expectations, not those of a reasonable prudent person.

Lerbacks argued that because the exclusionary clause required the court to

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[4]See cases listed in footnote 7.

focus attention on the insured's intentions or expectations, and because the evidence presented at the trial in the declaratory judgment action proved that Purdy did not intend or expect to injure Christian or Andrew Lerback, the exclusionary language did not apply in this case.

1. Legal inference ignores language of exclusion

Lerbacks argued that adoption of the rationale employed by the majority of other jurisdictions -- that an intent to injure or an expectation of injury could be inferred as a matter of law -- would violate the language of the insurance contract. The court's attention would no longer be focused on the insured's intentions or expectations; rather, the court's focus would simply be placed on determining what type of conduct was involved. Coverage would automatically be excluded for any injuries arising out of criminal sexual contact regardless of the insured's actual intent or expectation.

Since the insurance policy contained no specific exclusion for sexual molestation, Lerbacks argued that adoption of the rule of law urged by American Family illegally ignored the policy language. Rodriguez v. Williams, 729 P.2d 627, 630 (Wash. 1986).

2. Legal inference ignores individuality of the human mind

Lerbacks also urged the Supreme Court of South Dakota to reject American Family's proposition for the reason that it ignores the fact that each individual's mind operates differently. Some people suffer from mental aberrations that prevent them from thinking as reasonable prudent people. See, e.g., Gebhard, Gagman, Palmeroy, Christians, Sex Offenders (Harper & Row, 1965); Finkelhor, Child Sexual Abuse: New Theory and Research, (Free Press, 1984); Finkelhor, A Sourcebook on Child Sexual Abuse (Sage Publications, Inc., 1986).

In the case of pedophiles, this mental deficiency causes them to believe that they are engaged in a loving relationship with

their victims or that their victims are playmates. This twisted mental process prevents them from recognizing the inherent injury which their victims may suffer as a consequence of the sexual molestation.

Because of their impaired mental abilities, pedophiles do not intend to injure their victims; rather, they intend to bestow upon them love and affection. Because they believe they are bestowing love and affection upon their victims, they do not expect that their victims will be injured by their conduct.

The fact that mental deficiencies can affect human behavior has long been recognized by the law. Criminal defendants can be found not guilty by reason of insanity if, at the time of the alleged crime, they suffer from a mental disease or defect which renders them unable to appreciate the nature and quality or the wrongfulness of their acts. 18 U.S.C. §17.

Since the law recognizes that individuals may suffer from mental deficiencies

which may affect their ability to form intentions, Lerbacks argued that it would be improper to adopt a rule of law which removes the question of a person's intentions or expectations from the factual arena and transforms it into a legal conclusion. Lerbacks argued that by adopting such a rule of law, the Supreme Court of South Dakota would be ignoring the possibility that an individual might be suffering from a mental disease or defect which could prevent him from forming an intention or expectation that the victim of the sexual molestation would be injured.

Since the language of the exclusion would only apply if such an intention or expectation actually existed, and since a mentally impaired person may be unable to form the required intention or expectation, a rule of law which automatically inferred a malicious intention or expectation would extend application of the exclusion into factual circumstances where it would not otherwise apply.

3. Adoption of legal inference would ignore scientific evidence

Finally, Lerbacks argued that the adoption of the rule of law urged by American Family would ignore scientific evidence. There was scientific evidence presented at trial which proved that Purdy did not intend or expect to injure Christian and Andrew Lerback. Dr. McCall-Perez testified that in his opinion, Purdy did not intend or expect to injure the Lerback boys. (App. 9-11, 25-47.) American Family's expert, Dr. McGrath, testified that it was possible that Purdy did not intend or expect to injure the Lerback boys. (App. 52-55.) Thus, the testimony of American Family's own expert established that a rule of law which infers an intent to injure or an expectation of injury in every case of sexual molestation would be erroneous because some perpetrators do not intend or expect to injure their victims.

4. Adoption of legal inference would violate the Constitution of the United States

a. Due Process

In addition to opposing American Family's arguments, Lerbacks also informed the court that adoption of the rule of law urged by American Family would violate the Constitution of the United States. Lerbacks first raised these constitutional issues in Lerbacks' Brief of Appellees filed in the Supreme Court of South Dakota on August 2, 1991, at pp. 37-47. (App. 73-89.) These constitutional arguments were again discussed and an additional argument regarding constitutional violation was raised in Lerbacks' Petition for Rehearing dated April 10, 1992, at pp. 3-16. (App. 110-135).

The opinion of the Supreme Court of South Dakota did not acknowledge that any constitutional arguments had been presented. The Supreme Court of South Dakota's failure address the federal questions prompted Lerbacks to petition the

court for rehearing; however, a majority of the court did not request rehearing and an order denying the petition for rehearing was entered April 29, 1992. (App. 136-37.)

Lerbacks argued that inferring an intent to injure as a matter of law in cases involving sexual abuse deprived insureds of property without due process of law. See Brief of Appellees Lerback dated August 2, 1991 at pp. 37-45. (App. 73-89.)

i. Insureds hold a property interest in insurance coverage

First, Lerbacks established that insureds have a property interest in insurance coverage and proceeds. Bishop v. Wood, 426 U.S. 341, 344, n.6 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Gray Panthers v. Schweiker, 652 F.2d 146, 148 n. 2 (D.C. Cir. 1981); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979); Carlson v. Hudson, 277 N.W.2d 715, 719 (S.D. 1979) (a contractual provision can give rise to a claim of entitlement which may not be deprived without due process).

ii. Legal inference creates irrebuttable presumption

Next, Lerbacks demonstrated that adoption of a rule of law which infers an intent to injure or an expectation of injury in every case of sexual molestation creates an irrebuttable presumption. State Farm Fire & Casualty Company v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (the presumption of intent to harm is irrebuttable); State Farm Fire & Casualty Company v. Smith, 907 F.2d 900, 903 (9th Cir. 1990) (intent to harm may be inferred from sexual contact with a minor as a matter of law, irrespective of the intent of the insured).

The determination of the insured's intent is transformed from a question of fact to a question of law. Factual evidence tending to prove the insured's intent to injure, or lack thereof, becomes irrelevant because the law establishes the insured's intent to injure. The legal inference is irrebuttable.

iii. The irrebuttable presumption is not necessarily nor universally true

Lerbacks demonstrated that the irrebuttable presumption of an intent to injure or expectation of injury was not necessarily or universally true. Both psychological experts testified that some perpetrators of sexual molestation do not intend or expect to injure their victims. (App. 22-55.)

iv. The irrebuttable presumption unconstitutionally deprives citizens of property without due process of law

Lerbacks demonstrated how irrebuttable presumptions which are not necessarily or universally true violate the Constitution of the United States. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). These cases establish that irrebuttable presumptions violate the due process clauses of the Constitution because they

deprive persons of their property interests without providing them a fair opportunity to rebut the presumption.

Irrebuttable presumptions have long been disfavored under the due process clauses of the fifth and fourteenth amendments to the United States Constitution. Cleveland Board of Education v. LaFleur, 414 U.S. at 644.

v. Reasonable alternative means exist to determine intention or expectation

Irrebuttable presumptions which are not necessarily or universally true in fact are especially disfavored when reasonable alternative means exist for making the crucial determination. LaFleur, 414 U.S. at 644-45; Vlandis, 412 U.S. at 452. In sexual molestation cases, reasonable alternative means exists for making the determination of whether insureds intend or expect to injure their victims. That alternative is the precise declaratory judgment procedure which American Family elected to employ in this case.

A trial court is fully capable of hearing the evidence on both sides of the issue and rendering a decision whether an insured intended or expected to injure his victims. An irrebuttable presumption that all perpetrators of sexual molestation intend or expect to injure their victims is not warranted because reasonable alternative means exist for making that determination.

The adoption of a rule of law which infers as a matter of law that every perpetrator of sexual molestation intends or expects to injure his victims creates an irrebuttable presumption. The irrebuttable presumption is not necessarily or universally true. Reasonable alternative means exist for determining whether an insured intends or expects to injure.

Lerbacks provided the Supreme Court of South Dakota with authority from the Supreme Court of the United States holding that irrebuttable presumptions which are not necessarily or universally true violate

the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States. Nevertheless, the Supreme Court of South Dakota reversed the trial court and established a rule of law which infers an intent to injure or an expectation of injury in every case of criminal sexual contact. Purdy, 483 N.W. 2d at 201.

b. Equal Protection

Lerbacks cautioned the court that adoption of a legal inference that all perpetrators of criminal sexual contact intend or expect to injure their victims would deny equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States. This argument was first raised in Lerbacks' Appellees' Brief at p. 45 (App. 88-89), and was more fully developed in Lerbacks' Petition for Rehearing dated April 10, 1992, at pp. 8-10 (App. 120-24.)

i. Perpetrators of non-sexual criminal contact are afforded an opportunity to demonstrate the absence of intent to injure or expectation of injury

Lerbacks directed the Supreme Court of South Dakota's attention to the fact that in other cases involving criminal contact, the question of whether an insured intended or expected to injure the victim was a question of fact which precluded the award of summary judgment. See, e.g., Allstate Ins. Co. v. Steinemer, 723 F.2d 873 (11th Cir. 1984). See also, Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R.4th 957 (1984).

Shortly before oral argument of this matter before the Supreme Court of South Dakota, that court rendered its decision in the case of Tri-State Insurance Company of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991). The Bollinger case involved a fist fight between two men which resulted

in one man falling and breaking his ankle. The homeowner's insurance carrier for the perpetrator of the criminal contact denied coverage for the injury on the basis of the intentional injury exclusion contained in the homeowner's insurance policy.

The homeowner's policy involved in the Bollinger case excluded coverage for injury which was expected or intended by the insured. Id. at 699. The Supreme Court of South Dakota held that summary judgment would be improper because the exclusion would apply only if the injury (as opposed to the act) was intended or expected by the insured. Id. at 701. Since a genuine dispute existed regarding the insured's intentions or expectations, the Supreme Court of South Dakota ruled that summary judgment would be improper. Id. at 700-01.

ii. The legal inference applies a different legal standard which denies equal protection of the laws

Lerbacks argued that the Bollinger opinion recognized that just because a person's conduct might outwardly indicate an intent to injure or an expectation that injury could result as a consequence of the insured's act, it was possible that no such intention or expectation existed under the particular circumstances of each case. See also, Purdy, 483 N.W.2d at 200 ("Generally, the matter of coverage should be determined on a case by case basis as a question of fact after a consideration of all competent evidence by the fact finder."). That same rule of law should apply whether the criminal contact involved is one of aggressive physical assault and battery or one involving the fondling of a child's genitals without the use of force.

iii. No rational basis exists for distinguishing between criminal sexual contact and other forms of criminal contact

To apply a different standard simply because of the sexual nature of the assault denies equal protection of the law by

drawing a distinction without a difference. In either case -- criminal assault and battery or criminal sexual contact -- the person committing the crime could possibly be operating under circumstances where no intention or expectation of injury exists. In either case, the insured's intentions or expectations are questions of fact and should be decided on a case-by-case basis, not by summary judgment.

In Purdy, the Supreme Court of South Dakota distinguished Bollinger on the basis that it involved a spur-of-the-moment physical encounter between two men; whereas, Purdy involved repeated instances of sexual molestation occurring over several years. Purdy, 483 N.W.2d at 200. The South Dakota Supreme Court did not, however, discuss why that distinction transformed the question of fact -- Purdy's intentions or expectations -- into an issue which could be decided as a matter of law.

The Purdy decision of the Supreme Court of South Dakota, a branch of state

government, denies equal protection of the law. It establishes a specific class of individuals -- insureds who commit criminal sexual contact. It then deprives that class of a fundamental right -- its property interest in insurance coverage. There is no rational basis for discriminating against this class because the same mental deficiencies which may affect the abilities of other insureds to form intentions or expectations may also affect members of the class. The class is over-inclusive because it includes members who do not intend or expect to injure others.

The policy language was drafted so that coverage was excluded only if the insured intended or expected injury. The Purdy decision denies equal protection of the laws to those who sexually molest children because it deprives them of the opportunity to preserve their property interest in insurance coverage by demonstrating that they did not intend or

expect to injure their victims -- an opportunity which is afforded to all other insureds.

Equal protection of the laws demands that insurance companies provide coverage to criminal sexual abusers unless the insurance companies can prove that the insured intended or expected the victim to be injured. That same legal protection provided to other insured persons must be equally provided to those who commit criminal sexual contact.

c. Impairment of obligations of contract

In their Petition for Rehearing, Lerbacks informed the court that its holding in the Purdy opinion unconstitutionally impaired the obligations of contract. Petition For Rehearing, pp. 11-16 (App. 125-35.) The Constitution of the United States prohibits the establishment of any law which impairs the obligations of contract. U.S. Const. Art. I, § 10, cl. 1.

i. The Supreme Court of South Dakota is a state actor

Lerbacks stated that the Supreme Court of South Dakota, as a branch of state government is, therefore, a state actor for constitutional purposes. It established a law by its Purdy decision which impaired the obligations of the insurance contract between Purdy and American Family.

ii. The Purdy decision impairs the obligations of the insurance contract

The policy which was drafted by American Family excludes coverage for injuries which were intended or expected by the insured. The opinion of the South Dakota Supreme Court effectively expanded that language so that it applied not only under circumstances where the insured intended or expected injury, but also in any case involving criminal sexual contact, whether or not the insured intended or expected injury.

The Purdy opinion impairs the obligations of contract by eliminating insurance

coverage to insured perpetrators of criminal sexual contact who do not intend or expect to injure their victims. But for the Supreme Court of South Dakota's decision which established the rule of law which infers an intent to injure or an expectation of injury as a matter of law, those insureds would have been entitled to insurance coverage. The contractual obligations owed by insurance companies to those insureds are impaired to the insureds' detriment.

The Supreme Court of South Dakota denied Lerbacks' Petition for Rehearing without addressing this federal question.

ARGUMENTS SUPPORTING ISSUANCE OF A WRIT OF CERTIORARI

I. A State Court has Decided a Federal Question in a Way that Conflicts with Applicable Decisions of the Supreme Court of the United States

A. The Supreme Court of South Dakota established a rule of law which created an irrebuttable presumption that is not necessarily or universally true, and which serves to deprive insureds of insurance coverage without due process of law

1. Purdy established an irrebuttable presumption which is not necessarily or universally true

The Supreme Court of South Dakota's Purdy decision established a rule of law which creates an irrebuttable presumption that all perpetrators of criminal sexual contact intend to injure their victims, or expect that their victims will be injured. Purdy, 483 N.W. 2d at 201. Psychological evidence presented to the trial court by both parties -- including testimony by American Family's own psychological expert -- established that this irrebuttable presumption is not necessarily or universally true. (App. 25-55.)

2. The irrebuttable presumption deprives the insured of property without due process of law

The effect of the irrebuttable presumption is to deprive insureds who sexually molest children of insurance coverage without providing them an opportunity to prove that they did not intend or expect to injure their victims.

3. Purdy conflicts with applicable decisions of the Supreme Court of the United States

Because the rule of law established in the Purdy opinion as well as other jurisdictions throughout the United States[5] creates an irrebuttable presumption which is not necessarily or universally true, and which deprives insureds of their property interest in insurance coverage, and because reasonable alternative means exist for determining whether insureds intend or expect injury, the Purdy decision unconstitutionally deprives insureds who commit criminal sexual contact of their property without due process of law.

The Supreme Court of the United States has consistently held that under certain circumstances, irrebuttable presumptions violate the constitution of the United States. When an irrebuttable presumption is not necessarily or universally true, where reasonable alternative means exist

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[5] See cases listed in footnote 7.

for determining the presumed fact, and where application of the irrebuttable presumption results in the deprivation of a constitutionally guaranteed right, the irrebuttable presumption violates the federal constitution by depriving citizens of their constitutionally guaranteed interests without due process of law. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

a. Purdy establishes an irrebuttable presumption

The Purdy opinion establishes an irrebuttable presumption. The South Dakota Supreme Court held that in all criminal sexual contact cases, it will be inferred as a matter of law that harm was expected or intended. Purdy, 483 N.W.2d at 201. Such an inference is irrebuttable. State Farm Fire & Casualty Co. v. Abraio, 874 F.2d at 623 (the presumption of intent to harm is irrebuttable).

b. The irrebuttable presumption operates to deprive property

The irrebuttable presumption operates to deprive insureds who engage in criminal sexual contact of their property interest in insurance coverage without due process of law. Insureds possess a constitutionally protected property interest in insurance coverage. Bishop v. Wood, 426 U.S. 341, 344, n.6 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Gray Panthers v. Schweiker, 625 F.2d 146, 148, n.2 (D.C. Cir. 1981); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979); Carlson v. Hudson, 277 N.W.2d 715, 718 (S.D. 1979)

c. No pre-deprivation procedural protection is provided

The Purdy decision operates to automatically exclude insurance coverage in every case involving criminal sexual contact where the insurance policy contains an intentional injury exclusion. Insureds are not given a fair opportunity to

preserve their property interests in insurance coverage because any evidence that they did not intend or expect to harm the victims is rendered irrelevant by virtue of the Purdy rule of law. State Farm Fire & Casualty Co. v. Smith, 907 F.2d 900, 903 (9th Cir. 1990) (intent to harm may be inferred from sexual contact with a minor as a matter of law, irrespective of the actual subjective intent of the insured).

d. Reasonable alternative means exist for determining insureds' intentions or expectations

Reasonable alternative means exist for determining whether insureds intend or expect to injure their victims. Insurance companies can adequately protect their interests by initiating declaratory judgment actions to resolve that factual issue. The declaratory judgment procedure is not unduly burdensome and is essential to protect insureds' property rights from deprivation based upon exclusions which may

not apply under the specific facts and circumstances of each case.

The Supreme Court of South Dakota's Purdy decision established an irrebuttable presumption; the irrebuttable presumption operates to deprive insureds of property interests -- their interests in insurance coverage; the irrebuttable presumption is not necessarily or universally true in fact; and, reasonable alternative means exist for determining whether insureds intend or expect to injure their victims of criminal sexual contact

Decisions by the Supreme Court of the United States have established beyond dispute that this combination of factors requires abolishment of the rule of law which creates the irrebuttable presumption because the presumption violates the Constitution of the United States. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

B. Review is necessary to resolve the conflict between Purdy and decisions of the Supreme Court of the United States

The Supreme Court of South Dakota's Purdy decision, as well as decisions of jurisdictions throughout the United States on this very same issue,[6] conflicts with the aforementioned decisions of the Supreme Court of the United States. Because Purdy and numerous other judicial decisions contradict the law established by the Supreme Court of the United States, this petition for writ of certiorari presents an important federal question which cries out for resolution by the Supreme Court of the United States. Therefore, petitioner respectfully requests this court to issue a writ of certiorari to the Supreme Court of South Dakota so that the constitutional error being committed by many jurisdictions throughout the United States may be corrected.

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[6] See cases cited at footnote 7.

II. A State Court of Last Resort has Decided an Important Question of Federal Law which has not been, but Should be, Settled by the Supreme Court of the United States

A. The Purdy opinion denies equal protection of the law to perpetrators of criminal sexual contact by depriving them of insurance coverage without providing the same procedural safeguards afforded to perpetrators of other forms of criminal contact

This case presents an important federal question which should be decided by the United States Supreme Court because if the Purdy decision violates the Constitution of the United States, so do the opinions of state and federal courts rendered in similar cases in no less than twenty-five jurisdictions throughout the United States. Constitutional error being committed on such a grand scale mandates review by the Supreme Court of the United States.

1. This issue has been decided by a large number of jurisdictions

The very same issue presented in the Purdy case -- whether a claim for damages arising out of criminal sexual abuse is

excluded from homeowner's insurance coverage by the terms of an intentional injury exclusion -- has been presented to numerous state and federal courts.[7]

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[7]State Farm Fire & Cas. Co. v. Smith, 907 F.2d 900 (9th Cir. 1990); Foremost Ins. Co. v. Weetman, 726 F. Supp. 618 (W.D. Pa. 1989); Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056 (W.D. Okla. 1988); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815 (D. Alaska 1987); Allstate Ins. Co. v. Foster, 693 F. Supp. 886 (D. Nev. 1988); Allstate Ins. Co. v. Jack S., 709 F. Supp. 963 (D. Nev. 1989); CNA Ins. Co. v. McGinnis, 282 Ark. 90, 666 S.W.2d 689 (1984); Twin City Fire Ins. Co. v. Doe, 163 Ariz. 388, 788 P.2d 121 (App. 1989); J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689 (1991); Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990); Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989); Allstate Ins. Co. v. Jarvis, 195 Ga. App. 335, 393 S.E.2d 489 (1990); Roe v. State Farm Fire & Cas. Co., 188 Ga. App. 368, 373 S.E.2d 23 (1988); Scudder v. Hanover Ins. Co., 201 Ill. App. 3d 921, 147 Ill. Dec. 386, 559 N.E.2d 559 (1990); Altena v. United Fire & Cas. Co., 422 N.W.2d 485 (Iowa 1988); Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100 (Me. 1990); Harpy v. Nationwide Mutual Fire Ins., 76 Md. App. 474, 545 A.2d 718 (1988); Worcester Ins. v. Fells Acres Day School, 408 Mass. 393, 558 N.E.2d 958 (1990); State Mut. Ins. Co. v. Russell, 185 Mich. App. 521, 462 N.W.2d 785 (1990); Auto-Owners Ins. Co. v. Gardipey, 173 Mich. App. 711, 434 N.W.2d 220 (1988); Linebaugh v. Berdish, 144 Mich. App. 750, 376 N.W.2d 400 (1985); Estate of Lehmann by Lehmann v. Metzger, 355 N.W.2d 425 (Minn. 1984);

2. The majority infer an intent or expectation as a matter of law

The majority of these jurisdictions have held that an insured's intent to injure or expectation of injury can be

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State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421 (Minn. 1984); Horace Mann Ins. Co. v. Ind. Sch. Dist.No. 656, 355 N.W.2d 413 (Minn. 1984); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn. App. 1986); Mutual Service Cas. Ins. Co. v. Puhl, 354 N.W.2d 900 (Minn. App. 1984); New Hampshire Ins. Group v. Strecker, 244 Mont. 478, 798 P.2d 130 (Mont. 1990); State Farm Fire & Cas. v. van Gorder, 235 Neb. 355, 455 N.W.2d 543 (1990); Vermont Mut. Ins. Co. v. Malcolm, 128 N.H. 521, 517 A.2d 800 (1986); Atlantic Employers Ins. Co. v. Tots & Toddlers, 239 N.J. Super. 276, 571 A.2d 300 (1990), cert. denied, 122 N.J. 147, 584 A.2d 218 (1990); Western Nat. Assur. Co. v. Hecker, 43 Wash. App. 816, 719 P.2d 954 (1986); Rodriguez by Brennan v. Williams, 42 Wash. App. 633, 713 P.2d 135 (1986); Horace Mann Ins. Co. v. Leeber, 180 W. Va. 375, 376 S.E.2d 581 (1988); N.N. v. Moraine Mut. Ins. Co., 153 Wis. 2d 84, 450 N.W.2d 445 (1990); K.A.G. by Carson v. Stanford, 148 Wis.2d 158, 434 N.W.2d 790 (App. 1988); State Farm Fire & Casualty Co. v. Estate of Jenner, 856 F.2d 1359 (9th Cir. 1988), superseded, 874 F.2d 604 (9th Cir. 1989); State Auto Mutual Ins. Co. v. McIntyre, 652 F.Supp. 1177, 1195 (N.D. Alabama 1987); MacKinnon v. Hanover Insurance Company, 471 A.2d 1166 (N.H. 1984).

inferred as a matter of law when the insured sexually molests a child. Because this inference is a matter of law, factual evidence to the contrary is rendered irrelevant and inadmissable. Rodriguez by Brennan v. Williams, 42 Wash. App. 633, 713 P.2d 135 (1986).

More importantly, however, the rule of law established in these opinions destroys any possibility of insurance coverage provided by policies which include intentional injury exclusions.

3. The legal inference denies equal protection of law

Those jurisdictions which infer an intent to injure as a matter of law deny equal protection of the laws to insureds who commit criminal sexual contact. Individuals who commit other forms of criminal contact are given a fair hearing on the issue of their intentions or expectations.

This general rule was recognized by the Supreme Court of South Dakota's Purdy decision:

> "The circumstances under which the act in question was done usually serve to manifest to a greater degree the intent of the actor and may overcome his declaration as to his intention, but he has the right to testify to his intention and to have the circumstances surrounding the act considered in connection with his testimony."

Purdy, 483 N.W.2d at 200, quoting Shook v. Tinny, 122 Ill. App. 3d 741, 78 Ill. Dec. 58, 62, 461 N.E.2d 642 (1984) (emphasis added).

4. No rational basis exists for a distinction based on the type of crime

There is no rational basis for denying the same legal protection to those insureds who commit criminal sexual contact as is afforded to those who commit other forms of criminal contact. In either case, the insureds' intentions or expectations are questions of fact because the issue involves state of mind. "Actions involving

state of mind, which include cases involving intent, are not usually suited for summary disposition." Ahl v. Arnio, 388 N.W.2d 532, 534 (SD 1986). Since no two human minds operate identically, what one individual may intend or expect does not automatically and necessarily mean every individual has the same intentions or expectations under the same circumstances.

Since no rational basis exists for discriminating against those who commit criminal sexual contact, courts throughout the United States who infer an intent to injure or an expectation of injury as a matter of law in cases of criminal sexual contact deny equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States. Because the denial of equal protection is occurring on such a massive scale, this issue raises an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

B. The Purdy decision established a rule of law which impairs the obligations of contract in violation of the Constitution of the United States

The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). The obligation of contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819).

An important question of federal law which is raised by this petition is whether a judicial decision by a state's highest court establishes "law" as that term is used in the Constitution of the United States, article I, section 10, clause 1. If so, and if the judicial opinion by a state's highest court has the effect of impairing obligations of contracts, then the judicial opinion violates the United States Constitution just as surely as if the state's legislature had passed a law having

the same impairing effect upon the obligations of contracts.

1. An insurance agreement is a contract

It is beyond dispute that the insurance agreement between American Family and Purdy was a contract. The insurance policy established the terms under which American Family, in exchange for the payment of premiums, would defend and indemnify Purdy if others incurred bodily injury as a result of an occurrence.

The policy also contained a list of exclusions. The exclusions defined types of claims which would not obligate American Family to defend or indemnify Purdy. One such exclusion in the policy relieved American Family of any obligation to defend or indemnify Purdy against claims arising under circumstances where Purdy intended or expected to injure another person.

A trial on the issue of whether Purdy intended or expected to injure the Lerback boys resulted in a finding that Purdy had

not intended or expected to injure the children. (App. 69-70.) Thus, because the exclusion did not apply, the court ordered American Family to defend Purdy in the underlying principal action and to indemnify him for the amount of any judgment rendered against him in that action. (App. 64-65.)

On appeal, the Supreme Court of South Dakota stated that the trial court judge had correctly applied South Dakota law in denying American Family's motions for summary judgment. Purdy, 483 N.W.2d at 201. Under the law of South Dakota, as it existed at the time the question was before the trial court, whenever questions of fact existed, summary judgment was inappropriate. Id.

2. The Purdy decision established new law

However, in its Purdy decision, the Supreme Court of South Dakota carved a new exception into South Dakota law. The Purdy decision established a new law which infers

an intent to injure or an expectation of injury in every case involving criminal sexual contact. Id.

The Supreme Court of South Dakota then applied this newly created law and reversed the trial court's denial of summary judgment ordering the trial court to enter judgment in favor of American Family. Id. Because Purdy's intent to injure was established as a matter of law, the trial court was directed to enter judgment in favor of American Family based on the policy's intentional injury exclusion.

3. Purdy impaired the obligations of the insurance contract

The judicially-created law contained in the Purdy opinion impaired the insurance contract between Purdy and American Family. At the time the Purdys' homeowner's policy agreement was formed, and continuing throughout the years the sexual molestation was occurring, to the date of the Supreme Court of South Dakota's Purdy decision, the law of South Dakota held it to be a ques-

tion of fact whether an insured intended or expected injury. Bollinger, 476 N.W.2d 697 (SD 1991). If the insured did not intend or expect injury, the intentional injury exclusion contained in insurance policies would not apply. Id.

Following the issuance of the Purdy opinion, however, the law of South Dakota changed. No longer was the question of the insured's intentions or expectations a question of fact in cases involving criminal sexual contact. The issue was suddenly transformed into a matter of law which effectively excluded insurance coverage in every case of criminal sexual contact.

Prior to the issuance of the Purdy opinion, American Family was obligated to defend and indemnify Purdy in the underlying principal action because the trial court found that Purdy had not intended or expected to injure the Lerback boys. Thus, American Family was obligated to defend Purdy and indemnify him for any

judgment which the Lerbacks obtained against him.

The obligation which American Family owed to Purdy, and ultimately to the Lerbacks as judgment creditors of Purdy, was impaired when the Purdy decision was rendered. At that time, American Family was no longer obligated to defend or indemnify Purdy even though Purdy did not in fact intend or expect to injure the Lerback boys.

This change in American Family's contractual obligation to Purdy came about solely as a result of the Supreme Court of South Dakota's establishment of the rule of law set forth in the Purdy opinion. The Purdy opinion had the effect of retroactively changing the law which was in existence at the time the insurance agreement was formed and which was an implied term in the insurance agreement. Hipp v. Prudential Casualty and Surety Co., 60 S.D. 300, 244 N.W. 346, 348 (1946)(the law which exists at the time a contract is

formed becomes an implied term in the contract).

The Supreme Court of South Dakota, with the stroke of a pen in the Purdy decision, changed the law which had been an implied term in the insurance contract. The legal change in the contractual obligation was brought about by South Dakota's highest court just as surely as if the South Dakota legislature had done so. That change in the law had the effect of depriving Purdy, and ultimately the Lerbacks as Purdy's judgment creditors, of coverage which otherwise would have been available to satisfy the judgment.

The Constitution of the United States forbids any state from passing any law which impairs the obligations of contract. U.S. Const. art. I, § 10, cl. 1. The Supreme Court of South Dakota, as a branch of state government, is a state actor for constitutional analysis purposes. Its pronouncements in the form of judicial decisions have the force and effect of law.

Not only the parties to this action, but all other South Dakota citizens are bound by its decisions just as they would be by a legislative enactment.

The Purdy opinion impairs the obligations of the insurance contract in violation of the Constitution of the United States.

4. Whether a decision of a state court of last resort makes law subject to the Contracts Clause is an important federal question

The issue of whether a state's highest judicial authority violates the Constitution of the United States when it issues a judicial decision which has the effect of impairing obligations of contract is an important federal question which has not been, but should be, decided by the Supreme Court of the United States. Therefore, petitioners, respectfully request the court to issue a writ of certiorari to the Supreme Court of South Dakota so that this issue may be decided.

Conclusion

A substantial number of jurisdictions have issued decisions which violate constitutional principles. Some attempt to justify their judgments on the public policy which believes sexual molesters will be deterred from such conduct if they are forced to pay damages from their own funds. This line of reasoning believes perpetrators will be unjustly rewarded for their criminal conduct if insurance proceeds are available to compensate the victims of their misdeeds. See, e.g., Whitt v. Deleu, 707 F. Supp. 1011 (W.D. Wis. 1989).

There is, however, a great public interest in protecting the interests of the injured party. St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540 (Ariz. Ct. App. 1986); Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982).

Analysis of the argument that forcing a perpetrator to pay for damage he causes will somehow deter sexual molesters compels

the conclusion that any such deterrent effect is illusory:

> Initially, it is unlikely that the insured was induced to engage in the unlawful conduct by reliance upon the insurability of any claims arising therefrom or that allowing insurance coverage here would induce future similar unlawful conduct by practitioners. Nor does it appear that the policy was obtained in contemplation of a violation of the law . . . Furthermore, coverage does not allow the wrongdoer unjustly to benefit from his wrong. It is not the insured who will benefit, but the innocent victim who will be provided compensation for her injuries . . . In this instance, there is great public interest in protecting the interests of the injured party.

Asbury, 720 P.2d at 542; see also, Kambly, 319 N.W.2d at 385.

When the remote possibility that sexual molesters will be deterred by the denial of insurance coverage is weighed against the virtual certainty that without coverage, many innocent victims of sexual abuse will be denied any hope of compensation for their injuries, the policy bases supporting a presumption of a malicious intent or expectation are

severely eroded. This deprivation of compensation to victims becomes even more tragic when the lack of funds results in the victim being unable to seek counseling, and ultimately going on to sexually molest other children.

The presumption of an intent to injure or an expectation of injury is without logical support; it violates constitutional principles; and it contravenes public policy. This petition raises important federal questions which require resolution by the Supreme Court of the United States.

For all of the reasons set forth above, Lerbacks respectfully petition this court to issue a Writ of Certiorari to the Supreme Court of South Dakota to review the Purdy decision.

Respectfully Submitted,

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